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ALISON K.L. MOYERRochester City School District
Board of Education of the Rochester City School DistrictCity of Rochester
Lovely A. Warren as Mayor of the City of Rochester
Council of the City of Rochester
Monroe County Board of Elections

Total Fees Paid: \$0.00

Employee:

State of New York

MONROE COUNTY CLERK'S OFFICE
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ADAM J BELLO

MONROE COUNTY CLERK



SUPREME COURT
COUNTY OF MONROE STATE OF NEW YORK

ROCHESTER SCHOOL DISTRICT,
and the BOARD OF EDUCATION OF THE
ROCHESTER CITY SCHOOL DISTRICT,
and VAN HENRI WHITE, Individually and as
President of the Board of Education of the
Rochester City School District, and
CYNTHIA ELLIOTT, Individually and as
Vice President of the Board of Education of the
Rochester City School District,

Petitioners,

- against -

CITY OF ROCHESTER, LOVELY A. WARREN,
as Mayor of the City of Rochester, COUNCIL OF
THE CITY OF ROCHESTER, and the MONROE
COUNTY BOARD OF ELECTIONS,

Respondents.

ALISON K.L. MOYER, ESQ. an attorney admitted to practice before the Courts of the
State of New York, hereby states, under penalty of perjury, the following:

1. I am an attorney at law and Associate Counsel to Karl W. Kristoff, General Counsel
for the Rochester City School District, and attorneys for the Petitioners, Rochester City School
District (hereinafter the "District"), the Board of Education of the Rochester City School District
(hereinafter the "Board"), Van Henri White, Individually and as President of the Board of
Education of the Rochester City School District, and Cynthia Elliot, Individually and as Vice
President of the Board of Education of the Rochester City School District.

2. I am fully familiar with the facts herein. This affirmation is being submitted on
behalf of the Petitioners containing information which is believed to be true. Information not based

upon personal knowledge is based upon the matters believed to be true as contained in investigation, correspondence, pleadings, conferences and telephone conversations.

3. This affirmation is offered in reply to the opposition submitted by the Respondents, City of Rochester, Lovely A. Warren as Mayor of the City of Rochester and Council of the City of Rochester (hereinafter the "City Respondents"), and in further support of the Order to Show Cause and Petition pursuant to CPLR Article 78, CPLR § 7801, *et seq.*, and for declaratory judgment, that the Referendum referred to in Local Law 4, entitled "Our Children, Our Future," duly passed by the City Council, on June 18, 2019, approved by the Mayor, and adopted by the City on July 8, 2019 (hereinafter the "Referendum"), is an unauthorized advisory referendum and for an Order granting a Permanent Injunction, enjoining the Respondents from placing the Referendum on the Ballot for the November 5, 2019 general election in the City of Rochester (hereinafter the "Ballot") and/or removing the Referendum from the Ballot if already placed; and enjoining the Respondents from further using public funds with regard to the Referendum, and for such other and further relief as the Court deems just and equitable.

POINT I

PETITIONERS HAVE STANDING

4. It is respectfully submitted that Petitioners have standing to bring this action under CPLR Article 78. Individuals and entities who are challenging "administrative action threatened or done pursuant to an allegedly invalid law" have standing under Article 78. *Elefante v. Hanna*, 54 A.D.2d 822, 823; 389 N.Y.S.2d 501, 503 (4th Dept. 1976).

5. Education Law § 2551 provides that “the board of education of each city school district of a city with one hundred twenty-five thousand inhabitants or more according to the latest federal census is hereby continued as a body corporate.” The District is a municipal corporation, within the meaning of General Municipal Law § 2. All parties have standing to bring actions that involve the workings of their organization subject to statutory interpretation. “The right of a board of education of a school district to commence a CPLR Article 78 proceeding challenging an administrative determination . . . can be inferred as part of the school board’s duty and responsibility to provide a system of public education to all children within its district.” *Board of Education of Roosevelt Union Free School District v. Board of Trustees of the State University of New York*, 282 A.D.2d 166, 171; 723 N.Y.S.2d 262, 267 (3d Dept. 2001). Furthermore, “only a clear legislative intent to negate judicial review of the administrative determination will deprive the School Board of the capacity to sue.” *Id.*, at 172; 267. *See Board of Education of Liberpool Central School District v. Ambach*, 108 Misc.2d 632; 438 N.Y.S.2d 427 (Albany County 1981) (“Both the board and its officers are entitled to litigate questions concerning statutory interpretation.”).

6. In *Application of Board of Education, Yonkers City School Dist. v. City of Yonkers*, 136 Misc.2d 636 (Westchester County 1987), the Board of Education and others, including the Yonkers Federation of Teachers, filed an Article 78 petition to compel the City of Yonkers to transfer the City’s contribution to the school budget. The Court found that all parties had standing to bring the action. *See gen. Board of Education of Union Free School Dist. No. 4 of the Town of Greece v. Board of Education of the City of Rochester and City of Rochester*, 43 Misc.2d 803 (Monroe County 1964) (Where the Greece Board of Education filed a declaratory judgment action against the City of Rochester, challenging the validity of a local law.).

7. In *Andrews v. Nagourney*, 41 A.D.2d 778; 342 N.Y.S.2d 79 (2d Dept. 1973), a member of a City Charter revision commission brought an action under Article 78 to enjoin the Long Beach City Council from submitting a proposed city charter in an upcoming election. The Court determined that the petitioner had standing because he was “a member of a valid charter revision commission still in existence” and because the issue of the proceeding was a matter of “significant municipal concern to the citizens of Long Beach, involving the actions of municipal officials and only tangentially related to fiscal matters.” As such, the petitioner had “standing to bring this article 78 proceeding even though he does not show a personal grievance or a personal interest in the outcome.” *Andrews*, 41 A.D.2d at 778; 342 N.Y.S.2d at 80.

8. In *Julian v. LaSalle*, 22 A.D.3d 1033; 804 N.Y.S.2d 522 (4th Dept. 2005), the Mayor of Utica filed an Article 78 proceeding to remove from the general election ballot a referendum submitted by a charter revision commission of the City of Utica, providing for the recall of elected city officials. The Fourth Department determined that “contrary to respondents’ contention, petitioner has standing to challenge administrative action threatened or done pursuant to an allegedly invalid law. Indeed, we note that petitioner’s standing is of particular importance where, as here, the case involves a matter of significant municipal concern. Similarly, to the extent that petitioner challenges the procedures by which the Commission adopted the proposition and by which the proposition was placed on the general election ballot, the relief sought by petitioner is not premature despite the fact that the proposition ultimately may not be approved by the voters.” *Id.*, at 1034; 523-524.

9. It is respectfully submitted that the instant petition has been amended to name Van Henri White and Cynthia Elliott, individually, and as President and Vice President of the Board of Education of the Rochester City School District, due to Board President White and Board Vice

President Elliott's determination that they are interested parties pursuant to CPLR § 7802(d). It is respectfully submitted that Board President White and Board Vice President Elliott should be permitted to join the proceeding as petitioners and intervene in this action pursuant to CPLR § 7802(d) because, as officers and members of the Board of Education, and as individual residents and taxpayers of the City of Rochester, they have "a real and substantial interest in the outcome of the proceedings." *Bernstein v. Feiner*, 43 A.D.3d 1161, 1162; 842 N.Y.S.2d 556, 558 (2d Dept. 2007). See *New York County Lawyers' Association v. Bloomberg*, 30 Misc.3d 161; 908 N.Y.S.2d 872 (New York County 2010). Board President White and Board Vice President Elliott have standing to sue as officers and members of the Board, and as citizens, residents, and taxpayers. See *Julian, supra*; *Woodburn v. Village of Owego*, 151 A.D.3d 1216; 57 N.Y.S.3d 537 (3d Dept. 2017).

10. In this matter, all of the Petitioners have standing to bring this action. The District and the Board of Education have a duty to provide a system of public education to all children within the City of Rochester. See *Board of Education of Roosevelt Union Free School District, supra*; *Ithaca City School Dist. v. City of Ithaca*; 82 A.D.3d 1316; 918 N.Y.S.2d 232 (3d Dept. 2011). Board President White and Board Vice President Elliott have the right to bring an action to enjoin Respondents from placing the invalid Referendum on the Ballot.

11. Petitioners are also sufficiently aggrieved, and have the right to adjudication of this matter. The City Respondents are attempting to suspend or eliminate the Board of Education. According to the documents filed with the Board of Elections on July 26, 2019, true and accurate copies of which are attached as **Exhibit "A,"** the City's Referendum asks voters to determine if the City shall "enable the reform of our public schools by adopting a Local Law that would suspend

the terms of the Commissioners of the Board of Education for a period of at least five (5) years.”

See Exhibit “A.”

12. In the abstract to be provided to voters, the City claimed that “the proposed amendments to the City Charter would, for a period of five years, eliminate the Board of Commissioners of the City School District as local elective officers, thereby enabling the State Commissioner of Education to institute necessary processes and procedures to provide a better educational outcome for our City students.” *See Exhibit “A.”*

13. The City claims in its opposition papers that it has submitted the Referendum to “avoid any such conflict” that may exist “if State law changes.” *See the City Respondents’ memorandum of law, page 7.* The Referendum does not state that the Referendum is subject to State action, however. The City’s proposed Referendum and abstract ask voters to “suspend” or “eliminate the Board.” *See Exhibit “A.”* To the extent that the City may take the position that the Board is suspended or eliminated if the Referendum passes, despite the invalidity of such a position, harm would result to the District and to the Board.

14. It is further respectfully submitted that harm would also result to the residents of Rochester, who are being asked on Election Day to elect members of the Board of Education while at the same time being asked to vote on a Referendum to suspend or eliminate them. Such a Referendum on the ballot harms the democratic process, and must be prevented through a permanent injunction.

15. Based on the foregoing, the above case law, and upon the papers and pleadings previously submitted, it is respectfully submitted that the Petitioners have standing to bring this action, and this action is ripe for adjudication.

POINT II

THE REFERENDUM IS ADVISORY AND INVALID

**A. THE REFERENDUM IS NOT MANDATORY UNDER THE
MUNICIPAL HOME RULE LAW**

16. The City Respondents have claimed that the Referendum is “required” by the Municipal Home Rule Law. This is inaccurate. Municipal Home Rule Law § 23(2)(e) provides that “except as otherwise provided by or under authority of a state statute, a local law shall be subject to mandatory referendum if it . . . abolishes an elective office, or changes the method of nominating, electing or removing an elective officer, or changes the term of an elective office, or reduces the salary of an elective officer during his term of office.”

17. The Board of Education is not a local office subject to the Home Rule Law, however. Under the New York State Constitution, Article 9, Section 3, “the maintenance, support [and] administration of the public school system” is under the control of the State Legislature. *NY Const. Art. 9 § 3(a)(1)*.

18. In *Ithaca City School District, supra*, 82 A.D. 3d 1316, 1317; 918 N.Y.S.2d 232, 233 (*citations omitted*), the Third Department recognized that “the Court of Appeals has long held that a board of education is a governmental agency of the state . . . and that public education shall be beyond control by municipalities and politics.” See *Board of Education of the City School District of the City of New York v. City of New York*, 41 N.Y.2d 535; 394 N.Y.S.2d 148 (1977).

19. In *Lanza v. Wagner*, 11 N.Y.2d 317; 229 N.Y.S.2d 380 (1962), the Court of Appeals determined that the members of the New York City Board of Education were not local officers subject to the Home Rule Law. “On the contrary, it has long been settled that the

administration of public education is a State function to be kept separate and apart from all other local or municipal functions. Although members of a Board of Education in a city perform tasks generally regarded as connected with local government, they are officers of an independent corporation separate and distinct from the city, created by the State for the purpose of carrying out a purely state function and are not city officers within the compass of the Constitution's home rule provisions." *Id.*, at 326.

20. The sections of the City Charter mentioning the Board of Education have been on the books for over 100 years. The fact that the Board is mentioned in Sections 2-1 and 2-8 as elective officers as a carryover from the Charter's formation in 1907 does not make the Board a local office subject to a mandatory referendum under the Home Rule Law. For almost 50 years, the District and the Board have been under the control of the State of New York, not under the control of the City of Rochester. The City cannot preempt State law to suspend or eliminate the Board through the Referendum.

21. Moreover, upon information and belief, the previous amendments to the City Charter §§ 2-1, 2-8, and 2-13 were not made through a referendum. If changes were to be made to those sections, they may be made by the City Council, without the need for a popular vote.

22. It is respectfully submitted that the City's position that the Referendum is mandatory under the Home Rule Law is incorrect. The Referendum at issue has no legal effect, because the Board is governed by Education Law § 2552 and 2553, as acknowledged in FN 3 to the City Charter § 2-1. Because the Referendum lacks statutory authority, and does not, in fact, make any change to the applicable law, the Referendum is advisory, and therefore, invalid. *Mills v. Sweeney*, 219 N.Y. 213 (1916); *Astwood v. Cohen*, 291 N.Y. 484 (1943).

**B. THE LOCAL LAW IS PREEMPTED BY STATE LAW
AND THUS, IS ADVISORY**

23. The Referendum and proposed Local Law 4 are preempted by Education Law § 2553. The City Respondents have not contested that the District and Board are regulated by the State. It is well settled that “where the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with the State’s transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute.” *Albany Area Builders Association v. Town of Guilderland*, 74 N.Y.2d 372, 377; 547 N.Y.S.2d 627, 629 (1989). *See Haskell v. Pattison*, 2001 WL 1155004 (Rensselaer County 2001).

24. The City Respondents’ concern that the provisions in the Local Law mentioning the Board could be at odds with local laws if the State Legislature, at some future juncture, amends Education Law §§ 2552 and 2553 with regard to the Board, is unquestionably premature. The Legislature is not currently in session, and there are no bills that have advanced out of the Committee on Education to go before a vote of the Senate or Assembly.

25. The City is either putting the ‘cart before the horse’ or is attempting to be the ‘tail wagging the dog’ with its Referendum. Passage of the Local Law will make no difference to any future action by the State, and there are no valid grounds for an argument that Local action “will make State action more efficient” as concerns the Board. *See* the City Respondents’ memorandum of law, page 8.

26. Furthermore, the argument that “any member of the Rochester community discontent with the changes at the State level could argue that election of Commissioners of Schools has long been a matter of local concern governed by the City [which] could result in protracted litigation over whether the City Charter or State Education Law controls ” has no valid

support. As explained above, Courts have long held that school districts and boards of education are governed by the State, not by municipalities. *Lanza v. Wagner, supra*.

27. It is respectfully submitted that the Referendum seeking to “enable the reform of our public schools by adopting a Local Law that would suspend the terms of the Commissioners of the Board of Education” is purely advisory. *See Exhibit “A.”* The Referendum and proposed Local Law can have no legal effect or consequences.

28. The City is clearly using the Referendum to conduct an unauthorized public opinion poll. The Referendum is an improper ballot measure. *See Opinions of the New York State Comptroller*, Opinion No. 1988-70; Opinion No. 1991-58; Opinion No. 1996-18 *See also New York State Board of Elections 1977 Opinion No. 5*, available at <https://www.elections.ny.gov/NYSBOE/download/law/FormalOpinions.pdf>.

29. The nature of the public poll can be seen by the plain language of the Referendum and abstract, which states that voters should determine whether to request that the State “institute necessary processes and procedures in furtherance of better educational opportunities for our City students.” *See Exhibit “A.”*

30. Based on the foregoing, the above case law, and upon the papers and pleadings previously submitted, it is respectfully requested that the Petitioners’ petition should be granted because the Referendum is an improper and unauthorized advisory referendum.

31. It is also respectfully submitted that the City Respondents should be enjoined from using public funds to further promote or advocate for the Referendum or the passage of the Local Law. *See Stern v. Kramarsky*, 84 Misc.2d 447 (New York County 1975); *Opinions of the New*

York State Comptroller, Opinion No. 1980-411; Opinion No. 1980-762; Opinion No. 1988-32; Opinion No. 1992-31; Opinion No. 1994-5.

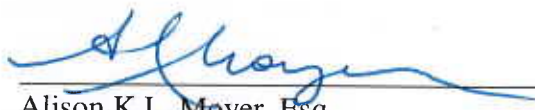
CONCLUSION

32. For the reasons as set forth above and as detailed in the accompanying Verified Petition, Verified Amended Petition and Affirmation of Alison Moyer, it is respectfully requested that the Court grant an Order and Judgment pursuant to CPLR Article 78, CPLR § 7801, *et seq.*, and for declaratory judgment, that the Referendum is an unauthorized advisory referendum, and for an Order and Judgment granting a Permanent Injunction, enjoining the Respondents from placing the Referendum on the on the Ballot, and/or removing the Referendum from the Ballot if already placed; and enjoining the Respondents from further using public funds with regard to the Referendum; along with such other and further relief as the Court deems just and equitable

Dated: July 30, 2019
Rochester, New York

ROCHESTER CITY SCHOOL DISTRICT
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